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No.

IN THE

Supreme Court of the United States

October Term, 1982

EVERETT JONES, Superintendent, Great Meadow Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

against

PEDRO ARROYO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

At respondent Arroyo's state trial, defense counsel approved a proposed supplemental instruction on intent which stated that people are presumed to intend the natural, probable and logical consequence of their acts. In light of Arroyo's express consent to that language, can he successfully maintain in a federal habeas corpus proceeding that inclusion of that language in the charge denied him due process?

The Court of Appeals answered that question in the affirmative.

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PETITION FOR A WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The District Attorney of New York County, on behalf of Everett Jones, the Superintendent of the Great Meadow Correctional Facility, and Robert Abrams, the Attorney General of the State of New York, petitions for a writ of certiorari to review a judgment of the United States Court

of Appeals for the Second Circuit. By that judgment, the Court of Appeals affirmed a decision of the United States District Court for the Southern District of New York granting respondent Arroyo a writ of habeas corpus.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is set forth in Appendix A, *infra*. The opinion of the United States District Court for the Southern District of New York, which is reported at 534 F.Supp. 980 under the name *Rivera* v. *Coombe*, is set forth in Appendix B, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

Statement of the Case

The State Trial Court Proceedings

Respondent Pedro Arroyo was indicted on June 9, 1972, in New York Supreme Court, New York County, for the attempted murder of a police officer named Raymond Bernard and for four related offenses. N.Y. Co. Ind. No. 2447/72. He proceeded to trial before Justice Hilda Schwartz and a jury on February 28, 1973.

The People's Case

At approximately 6:20 p.m. on April 13, 1972, a central police dispatcher issued a radio communication reporting a burglary in progress at a music store at 2152 Third Avenue in Manhattan. Upon hearing the report, uniformed Police Officers **Robert Glickstein** and **Douglas Schmidt** drove to the store in their marked police car (Glickstein: 283-87, 310-11; Schmidt: 329-31).* Officer Glickstein entered the music store as three men exited, brushing against him. The proprietor of the store screamed, "Get them," referring to the three men, who were walking in different directions. One of them was respondent Pedro Arroyo (Glickstein: 28, 290; Schmidt: 331).

Officers Glickstein and Schmidt stopped Arroyo about twenty feet from the music store, and walked him back to the store (Glickstein: 289-90; Schmidt: 332). As they reached the store, four other police officers drove up. At that point Arroyo jabbed Officer Glickstein with his elbow,

* Parenthetical references in this petition are to the minutes of respondent Arroyo's trial, unless otherwise identified.

broke free, and fled south (Dunn: 354-56; Johnson: 374-76; King: 389-91; Bernard: 422-25; Glickstein: 290; Schmidt: 332).

Uniformed Police Officer **Raymond Bernard**, who had just emerged from his police car, chased Arroyo and tried to tackle him on the corner of 117th Street and Third Avenue. Arroyo "squeezed past" Officer Bernard and, as he did so, reached beneath his jacket to the left chest area. He then drew out a gun and aimed back at Officer Bernard. The officer drew his service revolver and extended his right arm in a firing position (Glickstein: 296-99; Dunn: 357; King: 391; Bernard: 425-27, 456).

Arroyo fired first, from a position approximately five feet from Officer Bernard. Officer Bernard clutched his chest, which felt as if it had been "hit with a rock," and returned fire. Arroyo leaped over a car hood, then turned and discharged a second shot "directly" at Officer Bernard. The second shot missed (Glickstein: 299-301; Bernard: 427-29).

As other officers joined in the gun battle, Arroyo shielded himself behind a vehicle. He fired another round at Officer Bernard, and shot at the other officers as well. Finally, he shouted, "I'm hit. I give up." The police approached and one officer asked, "Where is the gun?" Arroyo answered, "Under the car," and the officer recovered the gun, a .32 caliber revolver from which all five shells had been discharged (Schmidt: 335-37; Dunn: 359-60; Johnson: 379-80; King: 393-94; Glickstein: 301-05; Bernard: 430-31; Cunningham: 506-07). When Arroyo was taken to a hospital, a shoulder holster was removed from

underneath his left arm before he was treated for his bullet wounds (Byrne: 403-07; Korsnes: 414-17).

After Arroyo surrendered, Officer Bernard examined himself and his service revolver. He discovered that Arroyo's first shot, fired while the officer was aiming his own revolver, had struck and shattered the wooden grip of that revolver. The bullet had traveled along the officer's hand, leaving a thin line of lead shavings beneath the skin, and then had hit the officer's chest, leaving a bullet hole in his police jacket (Bernard: 434, 439).

The Defense Case

Anna Colazo, a friend of Arroyo's family, and her daughter **Sue Lydia Pratts** testified that they saw the police shoot Arroyo. Both witnesses denied that Arroyo had a gun or fired any shots at the police (Colazo: 520-26, 537-38; Pratts: 546-49, 591-606). On cross-examination, Mrs. Colazo admitted that she told a defense investigator a week before the trial that Arroyo had been running with two males, one of whom was carrying a conga drum. The man with the drum had yelled to Arroyo, "Don't give up my gun." In her signed statement to the investigator, she had also stated that Arroyo had drawn a gun and fired three times. The statement was admitted in evidence (Defense Exhibit 1; Colazo: 528-29, 533-35, 540-41).

Pedro Arroyo testified that as he was walking alone on Third Avenue between 117th and 118th Streets, a uniformed police officer approached with his weapon drawn. Before the officer said anything, Arroyo pushed aside and held the officer's gun hand, grabbed a second gun from the officer's belt, hit the officer with the second gun, and then fled. As

Arroyo ran, other uniformed police officers shot at him. Arroyo was hit. When he "woke up" he found himself on the ground, and tried to surrender. However, the officers continued to fire and then kicked him. Arroyo testified both that he did not remember shooting at the police, and that he had not done so. He also denied that he robbed the music store and that he wore a holster that day (Arroyo: 608-13, 615-16, 618-19, 626-33, 636-37).

The Verdict and Sentence

During their deliberations the jurors reached guilty verdicts on the four lesser charges, and in doing so necessarily made findings that Arroyo acted with a specific intent when he fired at Officer Bernard. The jurors then asked for further instructions on intent before determining the attempted murder count. After Arroyo gave express consent, the court included in its supplemental charge the sentence,

> By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts.

The jurors thereafter found Arroyo guilty of attempted murder as well. On April 12, 1973, Arroyo was sentenced on the attempted murder count to an indeterminate prison term of from fifteen years to life, and on the remaining charges to shorter concurrent prison terms.

The State Post-Conviction Proceedings

Arroyo did not perfect his appeal to the Appellate Division, First Department, of the New York Supreme Court until the January Term of 1977. Among his several appel-

late arguments was a claim that the trial judge had erred in including presumption language in her supplemental instruction on intent. On April 14, 1977, the Appellate Division unanimously affirmed Arroyo's conviction for attempted murder in an opinion that did not address Arroyo's claim about the intent instruction. *People* v. *Arroyo,* 57 A.D.2d 523, 393 N.Y.S.2d 570 (1977). Leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles D. Breitel on May 12, 1977. *People* v. *Arroyo,* 42 N.Y.2d 826, 364 N.E.2d 1346, 396 N.Y.S.2d 1029 (1977).

On October 23, 1979, Arroyo moved in the trial court for an order vacating the judgment of conviction. Citing *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), Arroyo argued that the presumption language in the supplemental intent instruction had denied him due process. Justice Schwartz denied the motion. Justice Schwartz rejected the prosecutor's argument that Arroyo's failure to object to the intent instruction at trial constituted a forfeiture of the claim, and reached the merits.* On the merits, however, Justice Schwartz found that the use of presumption language had not denied Arroyo due process because

> in the totality of the entire charge and the detailed instructions to the jury in this case [the presumption language] did not have the same potential for impermissible burden shifting as the instruction struck down by the Supreme Court in *Sandstrom* (Opin. of May 19, 1980 at 14).

* Justice Schwartz's decision to reach the merits of the claim was the product of an incorrect understanding of New York procedural law. As the New York Court of Appeals made plain later in 1980, Arroyo's failure to object to the instruction should have been treated as a waiver of his claim. *People* v. *Thomas,* 50 N.Y.2d 467, 407 N.E.2d 430, 429 N.Y.S.2d 584.

Arroyo's application for leave to appeal Justice Schwartz's order to the Appellate Division, First Department, was denied on September 18, 1980. No further appellate review was available.

The District Court Proceedings

Arroyo filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York in February, 1981. On February 11, 1982, the district court (Ward, D.J.) granted the petition, ruling that the presumption language in the supplemental intent instruction denied Arroyo due process. In his opinion Judge Ward disagreed with Justice Schwartz's conclusion that the charge as a whole properly informed the jury that the prosecution had the burden of proving Arroyo's criminal intent.

The Proceedings in the Circuit Court of Appeals

On July 23, 1982, the Court of Appeals (Oakes, Meskill, and Kearse, C.J.) affirmed the judgment of the district court. In its discussion the court concluded that because the challenged presumption language was included in a supplemental intent instruction, delivered after the jury asked for a further explanation about intent, the court could not conclude that the "offending language" was "harmless beyond a reasonable doubt" (App. A at 9a). In its legal discussion the court made no reference whatever to the fact that Arroyo had consented at trial to the instruction which supposedly denied him due process.

Reasons for Granting the Writ

The decision below, which granted habeas corpus relief to a state prisoner convicted over nine years ago for attempting to kill a police officer, turned on the resolution of a conflict created by two of this Court's decisions. On one hand, this Court has held that a jury instruction on intent stating that the law presumes that a person intends the natural and probable consequences of his acts can amount to a denial of due process. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In *Sandstrom*, however, the defendant's intent was the sole issue at trial, and the defendant objected vigorously to the inclusion of the presumption language in the intent instruction. On the other hand, this Court has also held that if a state prisoner makes no effort to change an instruction through an objection, and thus is denied nothing he thought important enough to request, only under rare circumstances can it be determined on collateral attack that the instruction denied him due process. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

In this case, Arroyo, at his 1973 trial, failed to object to the inclusion of presumption language in the court's supplemental intent instruction. Indeed, Arroyo was consulted about the instruction in advance, and expressly consented to the proposed language. Arroyo's consent to the "natural and probable consequences" instruction may well have been the product of strategy, for the shots he fired fortuitously did not cause serious injury, and he may have thought it to his advantage to obtain an intent charge which focused attention on the consequences of his acts. Had the holding in *Henderson* v. *Kibbe* been applied, Arroyo's con-

sent to the charge should have been fatal to the due process attack on that charge, presented years later in Arroyo's habeas corpus petition.

The court below, however, resolved Arroyo's claim in Arroyo's favor, without any discussion whatever of Arroyo's consent to the charge. Apparently the court believed, as Arroyo in essence argued, that *Henderson* v. *Kibbe* lost its vitality when this Court decided *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). After *Wainwright* v. *Sykes*, the argument went, a failure to object should be considered only in the context of a procedural default claim, and should thereafter be ignored completely if the merits of the due process claim are reached.

Whether the court below was correct in believing that failure to object, or even express consent, to a jury instruction has no bearing whatever on the resolution of the merits of a subsequent due process attack on the instruction is a narrow, significant issue of habeas corpus law which should be resolved by this Court. The decision of the court below to ignore Arroyo's consent in its due process analysis is in apparent conflict with a recent decision of the Court of Appeals for the Sixth Circuit, in which that court considered highly relevant to the merits of a due process claim that at trial the petitioners had never protested the instructions later attacked in a habeas corpus proceeding. *Turoso* v. *Cleveland Municipal Court*, 674 F.2d 486, 494-95 (6th Cir. 1982) (petition for certiorari pending). Indeed, the decision below is inconsistent with the due process analysis employed by a district judge in the Second Circuit, in a case in which he sat by designation on the Circuit Court of

Appeals. *Ramirez* v. *Jones*, 683 F.2d 712, 717-18 (2d Cir. 1982) (Leval, D.J., concurring). Surely, the lower courts that will determine future habeas corpus petitions are entitled to guidance on whether, as the court below concluded, this Court's recent decision in *Henderson* v. *Kibbe* has effectively been overruled.

If the question here presented were one affecting only federal interests, it might be appropriate for this Court to withhold guidance from the lower courts pending further consideration of the matter in those courts. But habeas corpus law of course affects vital concerns of the states, and those concerns should not be left at risk when a decision from this Court reaffirming or limiting a prior decision could readily resolve the question. Moreover, the decision below could place those concerns at risk frequently, given this Court's recent statement that the merits of due process claims must be resolved in cases, like this one, in which a state court has considered the merits despite the defendant's failure to make proper objections. *Engle* v. *Isaac*, —— U.S. ——, 102 S. Ct. 1558, 1575 n. 44 (1982).

In this case, for example, New York has a most legitimate interest in the survival of an attempted murder conviction almost a decade old, arising from respondent Arroyo's effort from point-blank range to kill a New York City police officer who was simply performing his duties. Nonetheless, the court below concluded that Arroyo must be retried, solely because of an instruction Arroyo expressly approved in advance, and reached that conclusion without even considering his consent. The decision of the court below not to consider consent in evaluating a due process claim in a habeas corpus proceeding presents a substantial issue calling for review by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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